IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1007

H. EARL FULLILOVE, et al.,

Petitioners,

—against—

JUANITA KREPS, Secretary of Commerce of the United States of America, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE SOCIETY OF AMERICAN LAW TEACHERS BOARD OF GOVERNORS, *AMICI CURIAE*

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Interest of the Amici*

The American Civil Liberties Union for 59 years has devoted itself exclusively to protecting the fundamental

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* The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

rights of the people of the United States.

For nearly a decade, the governing board of our 200,000-member national organization has vigorously debated the issue of "numerically based affirmative action." The intensity and vigor of our discussions have heightened the ACLU's realization that the major civil liberties issue still facing the United States is the elimination, root and branch, of all vestiges of racism. No other right surpasses the wholly justified demand of the nation's discrete and insular minorities for access to the American mainstream from which they have so long been excluded.

In recognition of this right, the ACLU in 1973 adopted the following policy:

> "The root concept of the principle of non-discrimination is that individuals should be treated individually, in accordance with their personal merits, achievements and potential, and not on the basis of the supposed attributes of any class or caste with which they may be identified. However, when discrimination--and particularly

> when discrimination in employment and education--has been long and widely practiced against a particular class, it cannot be satisfactorily eliminated merely by the prospective adoption of neutral, 'color-blind' standards for selection among the applicants for available jobs or educational programs. Affirmative action is required to overcome the handicaps imposed by past discrimination of this sort; and, at the present time, affirmative action is especially demanded to increase the employment and the educational opportunities of racial minorities."

Pursuant to this policy, the ACLU, amicus curiae, filed a brief in this Court supporting the constitutionality and legality of the sixteen percent set aside for disadvantaged minorities in the race conscious admissions program at issue in Regents of the University of California v. Bakke, 438 U.S. 265 (1978). The ACLU and SALT, amici curiae, also filed a brief in this Court supporting the legality of the numerical goals, ratios and timetables in the race conscious on-the-job training program at issue in United Steelworkers of America v. Weber, 61 L.Ed.2d 480 (1979).

Subsequent to this Court's decision in Bakke, the ACLU's governing board again debated the appropriateness of numerically based affirmative action. As a result of these debates, our governing board in March 1979 "reaffirm[ed] the continuing need for vigorous efforts to redress the adverse effects of racism...in American society," and encouraged the adoption of numerical measures designed to remedy "current disadvantage caused by discrimination, whether specific or societal." Our revised policy also states with approval:

> "As Justice Blackmun has recognized [in *Bakke*], 'In order to get beyond racism, we must first take account of race.... We cannot--we dare not--let the Equal Protection Clause [perpetuate] racial supremacy.' [438 U.S. at 407]"

The instant case, following on the heels of Bakke and Weber, presents another facet of affirmative action: a race conscious law which sets aside ten percent of the contracts in a new government contracting program for

minority business enterprises. Premised upon nearly a decade of special but inadequate assistance for minority business enterprises, and specifically directed at alleviating the high unemployment rate in minority communities, this congressional enactment is but one more step necessary to get beyond racism.

The United States Court of Appeals for the Second Circuit found this congressional enactment constitutional. Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978).

For the reasons expressed in this brief, the ACLU urges this Court to affirm that decision.

The Society of American Law Teachers is a professional organization, formed in 1973, of approximately 400 professors of law at more than 120 law schools in the United States. Among its stated purposes is the encouragement of fuller access of racial minorities to the legal profession; since its inception the Society has been active in supporting the adoption and maintenance of special

minority admissions programs at American law schools. Its position is that voluntary affirmative action programs are fully consistent with the requirements of the Constitution of the United States and federal laws designed to eradicate racial dsicrimination. In accordance with this position, it has filed an amicus curiae brief, urging reversal, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and has joined with the American Civil Liberties Union in filing an amici curiae brief urging reversal in United Steelworkers of America v. Weber, 41 L.Ed.2d 480 (1979). Like the affirmative action programs involved in Bakke and in Weber, the MBE ten percent set aside involved in the present case represents an affirmative effort, this time by the federal government, to end the historic exclusion of blacks and other racial minorities from the American mainstream. If true racial equality is ever to be achieved in this Nation, it is imperative that such affirmative efforts be upheld by this Court.

For these reasons, the Society of

American Law Teachers joins the ACLU in this brief, urging this Court to affirm the judgment of the United States Court of Appeals for the Second Circuit, and to uphold the validity of the MBE ten percent set aside.

STATEMENT OF THE CASE

In 1976, the national unemployment rate was 7.7%, with the nonwhite rate nearly double at 13.1%.[1] A year later, there had been little improvement. The national unemployment rate was 7.0%, while the nonwhite rate remained at 13.1%.[2]

Congress, in the exercise of its economic powers, sought to reduce these high rates of unemployment and to stimulate general economic recovery from the lingering recession of several years earlier. It did so, in part, by enacting legislation authorizing billions of dollars for state and local government public works projects. One such enactment was the Local Public Works Capital Development and Investment Act of 1976, Pub.L.No. 94-369 (July 22, 1976), 90 Stat. 999, 42 U.S.C. §§6701, et seq. In that Act, Congress authorized

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1. U.S. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, 143 (Jan. 1978).

2. *Id.*

the Secretary of Commerce, acting through the Economic Development Administration, to distribute two billion dollars to state and local governments for local public works construction projects. 42 U.S.C. §§6701, 6702, 6710. As part of the Act, Congress established priorities and preferences for state and local governments in jurisdictions with particularly high unemployment rates and directed that grants should provide employment for unemployed persons in those jurisdictions. 42 U.S.C. §6707. Congress also incorporated into the Act a nondiscrimination provision similar to that of Title VI of the Civil Rights Act of 1964 and directed that it be enforced in a manner similar to that which is used to enforce Title VI. 42 U.S.C. §6727. Finally, Congress directed that the two billion dollar authorization be allocated and expended no later than September 30, 1977. 42 U.S.C. §6710.

In the spring of 1977, Congress recognized that its two billion dollar authorization was insufficient to reduce

unemployment or to stimulate economic recovery. It thus amended the law by enacting the Public Works Employment Act of 1977, Pub.L.No. 95-28 (May 13, 1977), 91 Stat. 116, 42 U.S.C. §§6701, et seq., as amended. The new Act increased the overall authorization to six billion dollars, 42 U.S.C. §6710, as amended; altered the priorities and preferences so as to increase the grants available to local governments in jurisdictions with particularly high rates of unemployment, 42 U.S.C. §6707, as amended; encouraged the Secretary to award grants to construction projects which would result in energy conservation, id.; changed the nondiscrimination enforcement provision from one paralleling Title VI to one paralleling the mandatory enforcement provisions in §122 of the State and Local Fiscal Assistance Act of 1972 ["the Revenue Sharing Act," 31 U.S.C. §1242], 42 U.S.C. §6727, as amended; and directed that no grants be made to a state or local government applicant unless the applicant assured the Secretary that at least ten percent

of the amount of each grant would be expended for minority business enterprises, 42 U.S.C. §6705(f)(2).

The last amendment, the subject of this litigation, provides as follows:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.*

This amendment, generally referred to as the "MBE [Minority Business Enterprise] ten percent set aside," was authored by Representative Parren J. Mitchell, who, at that time, was Chairman of the Subcommittee on Domestic

Monetary Policy of the House Committee on Banking, Finance and Urban Affairs; and Chairman of the Task Force on Human Resources of the House Committee on the Budget.

The amendment reflected a decade of experience by Congress and by the Executive Branch with providing economic and business assistance to minority business enterprises.

1. The Background of Minority Business Enterprise Programs

The preference in §103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), for Minority Business Enterprises did not originate with that law. Rather, it derives from a compendium of federal laws, federal regulations, and Executive Orders which together comprise the Minority Business Enterprise Program.

The origin of the MBE Program dates back to the enactment of the Small Business Act of 1953, Pub.L.No. 83-163 (July 30, 1953), 67 Stat. 232, an Act

which was replaced in 1958 by a new law known as "the Small Business Act," Pub. L.No. 85-536 (July 18, 1968), 72 Stat. 384. Amended at various times since then, the Small Business Act currently is codified at 15 U.S.C. §§631, et seq.

The evident purpose of the Small Business Act was to strengthen the economic position of small businesses, especially those businesses located in areas with high unemployment and with high proportions of low income individuals. 15 U.S.C. §631(b). In order to effectuate these objectives, Congress created the Small Business Administration ["SBA"], and directed that it be "under the general direction and supervision of the President." 15 U.S.C. §633(a). Under this direction and supervision, the SBA was authorized to make loans, guarantee loans, and provide for technical assistance to small businesses. 15 U.S.C. §636. Most significantly, under what is known as the Section 8(a) Program, the SBA was empowered to enter into procurement contracts with federal agencies and to

arrange for the performance of such contracts by letting subcontracts to small business enterprises. 15 U.S.C. §637(a).

Despite the beneficent purposes of the Small Business Act, the SBA was unexpectedly inactive for the first fifteen years of its existence. Virtually no aid of any significance flowed from the SBA to any small businesses, much less to minority business enterprises.[3]

In 1969, the SBA was awakened from its slumber. Acting under the authority granted by 15 U.S.C. §633(a), President Richard Nixon issued Executive Order 11458, 3 C.F.R. 109, 34 Fed.Reg. 4937 (March 5, 1969). With that Executive Order, the Minority Business Enterprise Program was formally established. The Order created within the SBA the Office of Minority Business Enterprise ["OMBE"] and further created a President's

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3. *See generally,* United States Commission on Civil Rights Report, Minorities and Women as Government Contractors, 29 n.54, 35 (May 1975).

Advisory Council for Minority Enterprise. The explicit purpose of the Executive Order was to rejuvenate the Section 8(a) Program so as to award procurement subcontracts to minority business enterprises.

A year later, President Nixon supplemented the foregoing Order with Executive Order 11518, 3 C.F.R. 109, 35 Fed.Reg. 4939 (March 21, 1970). That Order directed all federal departments and agencies to increase the proportion of procurement contracts to small businesses, especially to minority business enterprises.

In 1971, President Nixon superseded the old Orders with Executive Order 11625, 3 C.F.R. 213, 36 Fed.Reg. 19967 (Oct. 13, 1971). Titled as a "National Program for Minority Business Enterprise," the Executive Order was premised upon the recognition that the OMBE had "facilitated the strengthening and expansion of our minority enterprise program" but that it was necessary to make better use "of resources and opportunities in the minority enterprise

field" by authorizing the Secretary of Commerce "to implement Federal policy in support of the minority business enterprise program" and "to coordinate the participation of all federal departments and agencies in an increased minority enterprise effort." Id. The Executive Order indeed sought to accomplish such a national program. Section 1 of the Order required the Secretary to coordinate all federal, state, local and private efforts to strengthen minority business enterprises; Section 2 continued the existence of the Advisory Council for Minority Enterprise; Section 3 directed all federal departments and agencies to cooperate with the Secretary and to foster and promote minority business enterprises; and Section 5 authorized the Secretary to take all steps necessary to achieve the purposes of the Order. In Section 6 of the Order, "minority business enterprise" was formally defined:

> "'Minority business enterprise means a business enterprise that is owned or controlled by one or more

> socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background or other similar cause. Such persons include, but are not limited to, Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts." *Id.*

The foregoing definition of "minority business enterprise" was reiterated and further refined in new regulations issued by the SBA under its Section 8(a) Program. The pertinent regulation, 13 C.F.R. §124.8-1, 31 Fed. Reg. 13729 (May 25, 1973), provides in part:

> "(b) *Purpose*. It is the policy of SBA to use such authority to assist small business concerns owned and controlled by socially or economically disadvantaged persons to achieve a competitive position in the market place.
>
> "(c) *Eligibility*.--(1) *Social or economic disadvantage*. An applicant concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. Such disadvantage may arise from

cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, Oriental Americans, Eskimos, and Aleuts. Vietnam-era service in the Armed Forces may be a contributing factor in establishing social or economic disadvantage.

"(2) *Ownership and control*. Disadvantaged persons must presently own and control the concern except where a divestiture agreement or management contract, approved by the Associate Administrator for Procurement and Management Assistance, temporarily vests ownership or control in non-disadvantaged persons.

"(i) *Proprietorships*. An applicant concern may be a proprietorship.

"(ii) *Partnerships*. The ownership of at least a 50-percent interest in the partnership by disadvantaged persons will create a rebuttable presumption of ownership and control.

"(iii) *Corporations*. The ownership of at least 51 percent of each class of voting stock by disadvantaged persons will create a rebuttable presumption of ownership and control." *Id.*

No longer allowed to remain dormant, the SBA, acting through the OMBE, revived the Section 8(a) Program and began to award government procurement subcontracts to minority business enterprises. In

Fiscal Year ["FY"] 1968, for example, the SBA had awarded only 8 contracts totaling approximately $10.5 million to MBEs. In FY 1972, the SBA had increased its efforts by awarding 1720 contracts totaling more than $153 million to MBEs. Despite this dramatic increase, the procurement contracts awarded to minority firms under the Section 8(a) Program nonetheless were relatively minimal. In FY 1972, these contracts represented less than 0.3 percent of the total $57.5 billion of federal procurement.[4]

In the years subsequent to its establishment, the MBE Program was of course subjected to periodic review inside and outside Congress. In several reports to Congress, the MBE Program was praised as necessary and yet criticized as insufficient.[5] In response, Congress continued the MBE

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4. *Id.* at 41.

5. *See, e.g.*, House Comm. on Small Business, Summary of Activities, H.R. No. 94-1791, 94th Cong., 2d Sess. (1977); GAO Report to Congress: Questionable Effectiveness of the 8(a) Procurement Program 32 (April 1975).

Program. And although the Small Business Act was amended on several occasions in the early 1970s,[6] Congress kept the Section 8(a) Program intact.

The use of race conscious programs to assist minority business enterprises has not been limited to the SBA. They also have been adopted by Congress, for example, as part of the Railroad Revitalization & Regulatory Reform Act of 1976, Pub.L. No. 94-212 (Feb. 5, 1976), 90 Stat. 31, 49 U.S.C. §1657a. Under the Revitalization Act, as amended, Congress authorized the

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6. The Small Business Act Amendments of 1974, Pub.L.No. 93-386, 88 Stat. 742, increased the loan, guaranty, and investment ceilings of the Agency.

The Small Business Act Amendments of 1976, Pub.L.No. 94-305, 90 Stat. 667, established the Office of Export Development; aided the procurement of equipment to meet government pollution control standards; made changes in corporate securities requirements; provided for investment guarantees; assumed jurisdiction over unincorporated investment companies; repealed limitations on bank investment; provided for loans for plant acquisition; increased the amount available for economic opportunity loans, local development company loans, and regular business loans; and established the National Commission on Small Business in America.

establishment of a race-conscious administrative body, "The Minority Resource Center," whose specific and sole function was to assist and to encourage minority business enterprises. 49 U.S.C. §1657a (e). Thus, the Minority Resource Center was empowered to "enter into such contracts, cooperative agreements, or other transactions as may be necessary in the conduct of its functions and duties." 49 U.S.C. §1657a(e).

The federal regulations promulgated under the Act require detailed affirmative action programs to be established to guarantee employment and contractual opportunities. Specific goals and timetables must be established to hire minority employees in proportion to their percentage in the work force of the contracting area where prior underutilization of minority employees renders such establishment appropriate. 49 C.F.R. 265.13b(5). A similar provision for specific goals and timetables exists for minority businesses. 49 C.F.R. 265.13c(3)vi.

Overall, both Congress and the

Executive acted on numerous occasions prior to 1977 to strengthen minority business enterprises with the intent of increasing their share of government contracts. But the efforts fell far short of altering governmental exclusion of minority business enterprises from receipt of government contracts.

2. The Background of Government Contracting

Despite the federal government's Minority Business Enterprise Program, minority businesses have not fared well under government contracting. In FY 1972, for example, only 0.7 percent of all federal procurement contracts were awarded to minority business enterprises.[7] (Approximately half of these MBE contracts were awarded through the SBA's Section 8(a) Program.[8]) Since FY 1972, MBEs consistently have shared less than one percent of all federal procurement contracting.[9]

7. *See* note 3, *supra*, at 6.

8. *Id.*

9. U.S. Department of Commerce, A New Strategy for Minority Business Enterprise Development, at 4 (April 1979).

This exclusion of minority business enterprises from government contracting is not simply the result of open, competitive bidding. Indeed, most federal procurement contracts are awarded not through open, competitive bidding, but through negotiation with competing firms, and through "sole source" negotiation without competition. The latter methods of awarding multi-million dollar contracts is justified by the government on grounds of urgency, lack of competitors, need for standardization, and other factors.

Noncompetitive "sole source" contracting accounts for a sizeable portion of all federal contracts. It, in fact, has been the primary means of contracting used by such agencies as the Department of Defense, the National Aeronautics and Space Administration, and the Department of Energy (formerly the Atomic Energy Commission and the Energy Research and Development Administration).[10] Significantly, in FY 1972, these three agencies alone accounted for $43.2 billion or more than 70 per-

10. See note 3 *supra*, at 2, 6, 7.

cent of the $57.5 billion of federal procurement contracts.[11]

Given the small size of most MBEs and the relatively smaller size of contracts awarded by state and local governments, it might be expected that a higher proportion of these contracts would be awarded to MBEs. This should be especially true since state and local governments spend far more proportionately than the federal government for construction (approximately 40% by state and local governments compared to less than 10% by the federal government), and since a disproportionately large percentage (approximately 10%) of minority firms are small construction contractors.[12]

Whatever the expectations may be, state and local governments have been no less exclusionary than the federal government. In some instances, MBEs have been totally excluded from state and local contracting. For example, during FY 1972, Denver's Department of Public Works awarded more than $23

11. *Id.*

12. *Id.* at 9.

million in contracts but none went to minority businesses.[13] California, which has an annual procurement budget of $500 million, awarded merely $10,000 in contracts to minority enterprises in FY 1972 and only $60,000 during FY 1973.[14]

Overall, of the $62.5 billion spent by state and local governments on goods and services in the private sector in 1972, less than 0.7 percent of all contracting dollars were awarded to minority firms.[15]

This record, like the federal government's record, is appalling in itself. And it was no doubt appalling to Congress, which had increased federal aid to state and local governments from $2 billion in FY 1950 to $45 billion in FY 1974.[16]

13. U.S. Commission on Civil Rights, note 3 *supra*, at 95.

14. *Id.* at 97.

15. *Id.* at 95.

16. *Id.* at 89.

3. The Enactment of the MBE Ten Percent Set Aside

When Congress in the spring of 1977 considered enactment of the Public Works Employment Act of 1977, it had before it numerous reports summarizing the severe underrepresentation of minority business enterprises in federal, state and local government contracting.[17] Congress knew, for example, that the federal government and state and local governments together awarded more than 99% of all government procurement contracts to white business enterprises.[18] Congress also was aware that SBA's Section 8(a) Program applied only to federal procurement, and that even there it had not been successful in remedying the federal government's historic exclusion of MBEs from federal contracting.[19]

17. *See, e.g.*, U.S. Commission on Civil Rights "Minorities and Women as Government Contractors" (May 1975); GAO Report to Congress, "Questionable Effectiveness of the 8(a) Procurement Program" (April 1975).

18. U.S. Commission on Civil Rights, *supra*, at vii.

19. GAO Report to Congress, *supra*, at 4.

Congress, like the courts, was also aware that most government construction contracts are awarded by state and local governments, that most construction firms are formed by entrepreneurs who are skilled craft workers, and that the extensive racial discrimination in the building trades had prevented minority workers not only from obtaining necessary skills but also from forming their own viable concerns. These latter conclusions were known to Congress as evidenced by its rejection of legislative efforts in 1969 and 1972 to eviscerate the affirmative action requirements imposed on the construction industry by Executive Order 11246,[20] and its own observations.[21]

20. The 1969 and 1972 legislative history is set forth in the Brief of the ACLU and SALT, *amici curiae*, at 75-89, filed in United Steelworkers v. Weber, 61 L.Ed.2d 480 (1979).

21. In United Steelworkers of America v. Weber, 61 L.Ed.2d 480 (1979), this Court took judicial notice of the past discrimination in the construction industry, stating:

> "Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. See, *e.g.*, *United*

Aware of these conditions, Congress in the early spring of 1977 focused on legislation that could help to remedy some of these past patterns: the Public

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States v. *International Union of Elevator Constructors*, 538 F.2d 1012 (CA3 1976); *Associated General Contractors of Massachusetts* v. *Alshuler* [sic], 490 F.2d 9 (CA1 1973); *Southern Illinois Builders Association* v. *Ogilve* [sic], 471 F.2d 159 (CA3 1972); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (CA3 1971); *Local 53 of International Association of Heat & Frost, etc.* v. *Vogler*, 407 F.2d 1047 (CA5 1969); *Buckner* v. *Goodyear*, 339 F.Supp. 1108 (ND Ala. 1972), aff'd without opinion, 476 F.2d 1287 (CA5 1973). See also United States Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions 58-94 (1976) (summarizing judicial findings of discrimination by craft unions); G. Myrdal, An American Dilemma (1944) 1079-1124; R. Marshall and V. Briggs, The Negro and Apprenticeship (1967); S. Spero and A. Harris, The Black Worker (1931); United States Commission on Civil Rights, Employment 97 (1961); State Advisory Committee, United States Commission on Civil Rights, 50 States Report 209 (1961); Marshall, "The Negro in Southern Unions," in The Negro and the American Labor Movement (ed Jacobson, Anchor 1968) p 145; App, 63, 104." 61 L.Ed.2d at 486 n.1.

Works Employment Act of 1977. Designed to decrease unemployment and to speed economic recovery, the Act authorized the expenditure of $4 billion of new federal money for state and local government construction projects. Construction, of course, was the precise area where minorities in the past had suffered such egregious discrimination and where there nonetheless existed a sizeable number of minority businesses. Congress quite plainly was confronted with a vehicle which could remedy past patterns.

During the debates on H.R. 11, the House version of the Public Works Employment Act, Representative Mitchell offered the MBE ten percent set aside as an amendment to the Act. 123 Cong.Rec. H.1436 (daily ed. Feb. 24, 1977). He observed that it was consistent with the SBA and OMBE programs, and otherwise explained the amendment in considerable detail:

> "I want to commend the chairman and the members of the committee who have done a great deal to make this public works bill far more equitable than it was last year. They have targeted and have amended the legislation to cover areas of high unemployment and they have improved the

legislation so that it is a much better bill. But there is one shortcoming that I see in the bill that I am attempting to address through my amendment. That shortcoming is that there will be numerous contracts awarded at the local level for various public works projects, but in that there is no targeting--and I repeat--there is no targeting for minority enterprises.

"Let me tell the Members how ridiculous it is not to target for minority enterprises. We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a piece of the action, the Federal Government is absolutely remiss. All it does is say that, 'We will create you on the one hand and, on the other hand, we will deny you.' That denial is made absolutely clear when one looks at the amount of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. The average percentage of minority contracts, of all Government contracts, in any given fiscal year, is 1 percent--1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA and we approve other budgets, to run those minority enterprises, to make them become viable entities in our system but then on the other hand we say no, they are cut off from contracts.

"In the present legislation before us it seems to me that we have an excellent opportunity to begin to remedy this situation.

"I know what the points in opposition will be. The first point in opposition will be that you cannot have a set-aside. Well, Madam Chairman, we have been doing this for the last 10 years in Government. The 8-A set aside under SBA has been tested in the courts more than 30 times and has been found to be legitimate and bona fide. We are doing it in this bill. We are targeting for the Indians, that is a set-aside. All that I am asking is that we set aside also for minority contractors.

"...That is because that is the only way we are going to get the minority enterprises into our system.

"...We cannot continue to hand out survival support programs for the poor in this country. We cannot continue that forever. The only way we can put an end to that kind of a program is through building a viable minority business system. So, I am deadly serious about it." 123 Cong.Rec. H.1436-37 (daily ed. Feb. 24, 1977).

Subsequent to Mr. Mitchell's introduction of the MBE ten percent set aside, the Committee of the Whole, for the most part, debated neither the purposes of nor the need for the amendment but rather its effect in jurisdictions where there were few or virtually no qualified minority contractors. This issue was first raised by Representative Abraham Kazen: "What happens in the rural areas where there

are no minority enterprises?" Id. Representative Mitchell responded that the amendment would not apply in those areas, that administrative procedures to this effect already were in operation under the minority contracting program encompassed in Executive Order 11246, and that the Secretary of Commerce was assumed to have a similar authority under the bill. Id. Another Member, Representative Robert Roe, Chairman of the Economic Development Subcommittee of the House Committee on Public Works and Transportation, proposed that the "assumption" be added to Representative Mitchell's amendment by making the MBE ten percent set aside non-mandatory through prefatory language: "Except to the extent the Secretary determines otherwise...." Id. at 1438. After further discussion, Representative Mitchell agreed: "I accept the amendment to my amendment." Id.

Throughout the entire debate in the House, no Member expressed any opposition to the MBE ten percent set aside. All of the commentary was favorable. Representative John Conyers, for example, stated

that "minority contractors and businessmen who are trying to enter in on the bidding process...get the 'works' almost every time. The sad fact of the matter is that minority enterprises usually lose out.... [T]hrough no fault of their own, [they] simply have not been able to get their foot in the door." Id. at 1440.

Additional comments in support of the MBE ten percent set aside were made by Representative Mario Biaggi who stressed the need to reduce the high rate of unemployment among minority workers and to remedy the exclusion of minority enterprises from government contracting:

> "I rise to indicate my full support of the amendment offered by my distinguished colleague from Maryland as amended by the gentleman from New Jersey (Mr. Roe). I consider the amendment wholly complementary to the bill as its objective is to guarantee to minority business enterprises that they too will benefit from the passage of this legislation.
>
> "This Nation's record with respect to providing opportunities for minority businesses is a sorry one. Unemployment among minority groups is running as high as 35 percent. Approximately 20 percent of minority busi-

> nesses have been disolved [sic] in a period of economic recession. The consequences have been felt in millions of minority homes across the Nation.
>
> "What the amendment seeks to do is guarantee that at least 10 percent of all funds in this legislation will go to contracts which will be awarded to minority business enterprises. This is not an unreasonable demand--in fact it is quite modest. If implemented however it could have great benefits to the entire minority community. Fiscal year 1976 figures indicate that less than 1 percent of all Federal procurement contracts went to minority business enterprises. This is a situation which must be [r]emedied.
>
> "The objectives of this legislation are both necessary and admirable. Yet without adoption of this amendment, this legislation may be potentially inequitable to minority businesses and workers. It is time that the thousands of minority businessmen enjoyed a sense of economic parity. This amendment will go a long way toward helping to achieve this parity and more importantly to promote a sense of economic equality in this Nation." *Id.*

After additional debate, Representative Mitchell's amendment was adopted on a voice vote by the Committee of the Whole. Id. at 1441.

The proceedings in the Senate on the Public Works Employment Act paralleled those in the House. Early in the debates

on S.427, the Senate version of H.R. 11, Senator Edward Brooke offered an MBE ten percent set aside amendment very similar to that adopted by the House. 123 Cong. Rec. S.3910 (daily ed., March 10, 1977).

Recognizing that the purpose of the Act was to increase employment, Senator Brooke focused on the severe unemployment of members of racial and ethnic minorities. He stated that it was "important that we focus on the unemployment experiences of different ethnic and racial groups in designing a sensitive and responsive jobs program. For example, among minority citizens, the average rate of unemployment runs double that among white citizens." Id.

Senator Brooke viewed the percentage targeting concept as "entirely proper, appropriate and necessary." Id.

> "It is a proper concept, recognized for example in this committee's bill which set aside up to 2½ percent for projects requested by Indians or Alaska Native villages. And, the Federal Government, for the last 10 years in programs like SBA's 8(a) set-asides, and the Railroad Revitalization Act's minority resources centers, to name a few, has accepted the

set aside concept as a legitimate tool to insure participation by hitherto excluded or unrepresented groups." *Id.*

Senator Brooke added that the set aside also was appropriate:

> "It is an appropriate concept, because minority businesses' work forces are principally drawn from residents of communities with severe and chronic unemployment. With more business, these firms can hire even more minority citizens. Only with a healthy, vital minority business sector can we hope to make dramatic strides in our fight against the massive and chronic unemployment which plagues minority communities throughout this country." *Id.*

Finally, echoing Parren Mitchell's observations, he noted that the program was "necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool." Id. Senator Brooke then assuaged possible concerns about the amendment:

> "Many have expressed concern about the impact of this amendment as a limitation on contracting in areas where there are few minorities. But this amendment is not a limitation. Rather, it is designed to facilitate greater equality in contracting. This amendment provides a rule-of-thumb which requires much more than the vague 'good-faith efforts' language which currently hampers our efforts to insure minority participation.
>
> "One final objection to this set-aside may be that it will cause undue delays in beginning these vital public works projects. In fact, EDA already maintains a roster for each State of capable and qualified minority enterprises who are ready and willing to work. These firms are capable of competitive bidding, and need the financial support which this potential level of Federal contracting will guarantee." *Id.*

As in the House, no Member raised any objection to the amendment. One Senator, however, voiced concern about the amendment. Senator John Durkin questioned the application of the amendment to states with small minority populations. Senator Brooke responded to this concern by noting that the language of his amendment insured the fair funding of projects through wide discretion granted to the Secretary.[22] Satisfied,

22. This language, which differs from that contained in the House version, reads:

Senator Durkin asked one last question:

> Mr. DURKIN. "May I be a co-sponsor?
> Mr. BROOKE. "Yes.
> Mr. PRESIDENT. "I ask unanimous consent that the name of the distinguished Senator from New Hampshire be added as a co-sponsor.
> The PRESIDING OFFICER. "Without objection, it is so ordered." *Id.*

The majority and minority floor managers, Senators Quentin Burdick and Robert Stafford, agreed to accept the amendment and it was adopted on a voice vote. Id. The differences between the House and Senate versions were resolved in ~~c~~onference, H.R. Conf.Rep. No. 95-230, 85th Cong., 1st Sess. at 9 (April 28, 1977); and the House version was enacted as law, 123 Cong.Rec. S.6755-6757 (daily ed.. April 29, 1977); 123 Cong.Rec. H. 3920-3935 (daily ed. May 3, 1977).

"This section shall not be interpreted to defund projects with less than 10 percent minority participation in areas with minority population of less than 5 percent. In that event, the correct level of minority participation will be predetermined by the Secretary in consultation with EDA and based upon its lists of qualified minority contractors and its solicitation of competitive bids from all minority firms on these lists." 123 Cong.Rec. S.3910 (daily ed. March 10, 1977).

SUMMARY OF ARGUMENT

When Congress enacted the Public Works Employment Act of 1977, 42 U.S.C. §§6701, et seq., it sought to alleviate unemployment and to stimulate economic recovery in the private sector by authorizing $4 billion in new federal monies flowing to private contractors. Concerned about the especially high rate of unemployment among minority workers, aware of the inadequacy of past MBE Programs, and determined to alter the severe underrepresentation of minority business enterprises in government contracting, Congress targeted ten percent of the new federal monies for minority business enterprises. 42 U.S.C. §6705(f)(2). In view of the scope of the problems faced by Congress, this ten percent target, as described by Representative Mario Biaggi, was "not unreasonable--in fact it is quite modest." 123 Cong.Rec. H. 1440 (daily ed. Feb. 24, 1977).

The ten percent set aside not only is quite modest. It also is lawful under

Title VI of the Civil Rights Act of 1964 and constitutional under the equal protection component of the Fifth Amendment.

1. The same Public Works Employment Act that contains the ten percent set aside, 42 U.S.C. §6705(f)(2), also contains a general nondiscrimination provision stating that no person shall "on the ground of race, color [or] national origin...be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity...[which] receives funds made available under this subchapter." 42 U.S.C. §6727(a). This language is virtually identical to the ban against discrimination found in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

Congress in 1977 quite obviously saw no inconsistency between the ban on discrimination and the Act's race conscious ten percent set aside for minority business enterprises. Whatever Title VI may have meant when it was enacted in 1964, see Regents of the University of California v. Bakke, 438 U.S. 265 (1978), its ban on discrimination was viewed by

Congress in 1977 as entirely consistent with race conscious set asides.

Even if the ten percent set aside were viewed in isolation from the Act's prohibition against racial discrimination parallel to that in Title VI, the ten percent set aside still would not violate Title VI. To the extent that any two legislative enactments conflict, it is settled that the specific act later in time controls the former general one.

Since the Public Works Employment Act of 1977 with its ten percent set aside was enacted by Congress after Title VI had been enacted, the ten percent set aside is not and cannot be unlawful under Title VI.

2. Among the unmistakeable purposes of the ten percent set aside, as summarized by Senator Edward Brooke, was the need to make "strides in our fight against the massive and chronic unemployment which plagues minority communities throughout this country." 123 Cong.Rec.

S.3920 (daily ed. March 10, 1977). Moreover, of crucial significance is the fact that the entire Public Works Employment Act was designed to fuel our economy by pumping $4 billion of new federal money into the coffers of private contractors. Because of the legislative design of this program, the ten percent set aside cannot be found to have been premised upon a racially discriminatory purpose. United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Washington v. Davis, 426 U.S. 229 (1976). Additionally, because it was a new program providing billions of dollars to white contractors, and because it in no way fenced out white contractors from receiving the lion's share of new government contracts, the legislative plan had no discriminatory impact upon whites. United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Palmer v. Thompson, 403 U.S. 217 (1971). "Having failed to show that the legislative... plan had either the purpose or the effect of discriminating against them on the basis of their race, the petitioners have offered no basis for affording them the

constitutional relief they seek." United Jewish Organizations v. Carey, 430 U.S. at 180 (concurring opinion of Stewart, J., with Powell, J.).

3. Even if this legislative plan had a discriminatory purpose or effect, the constitutionality of the ten percent set aside would be determined under the intermediate standard of review applicable to racial classifications which have a benign, compensatory purpose. Regents of the University of California v. Bakke, 438 U.S. 265, 355-380 (1978) (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.). Indeed, the strict scrutiny standard of review is especially inapplicable here because the ten percent set aside is premised upon administrative and legislative findings of severe minority underrepresentation in government contracting, a problem which Congress is uniquely capable of remedying. Regents of the University of California v. Bakke, 438 U.S. 265, 300-310 (1978) (opinion of Powell, J.); Califano v. Webster, 430 U.S. 313 (1977); Hampton v. Mow Sun Wong,

426 U.S. 88 (1976); Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

Under the intermediate standard of review, the ten percent set aside must be sustained. As in Bakke, the race conscious plan here serves the important and articulated purpose "of remedying the effects of past societal discrimination" in a context where "there is a sound basis for concluding that minority under-representation is substantial and chronic ...." 438 U.S. at 362 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.). It also serves the important and articulated purposes of "building a viable minority business system," 123 Cong.Rec. H. 1436-37 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell); of "promot[ing] a sense of economic equality in this Nation," id. at 1440 (remarks of Rep. Biaggi); of "facilitat[ing] greater equality in contracting," 123 Cong.Rec. S.3910 (daily ed. March 10, 1977) (remarks of Sen.Brooke); and, of course, of fighting "the massive and chronic unemployment which plagues minority communities

throughout this country," id. Finally, as in Bakke, this race conscious plan neither "stigmatizes any group [n]or... singles out those least well represented in the political process to bear the brunt of [this] benign program." 438 U.S. at 361 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

4. In view of the demonstrated inadequacy of past and ongoing MBE Programs to alter our government contracting practices which award less than 1% of all government contracts to minority business enterprises, the ten percent set aside would be sustained as constitutional even under the strict scrutiny standard of review. See Regents of the University of California v. Bakke, 438 U.S. 265, 305 (1978) (opinion of Powell, J.). As Senator Brooke commented, the ten percent set aside is "necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive Orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool." 123

Cong.Rec. S.3910 (daily ed. March 10, 1977). The purposes of the race conscious set aside unquestionably are substantial and compelling; the set aside is necessary to accomplish its purposes; and no less restrictive alternative is available.

ARGUMENT

Shortly after Congress made $4 billion of new contracting money available to construction contractors, reserving only ten percent for the economic recovery of minority business enterprises, the MBE ten percent set aside in §103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2), was roundly challenged in lawsuit upon lawsuit by various state and local chapters of the Associated General Contractors of America, Inc. The contractors' associations this time were not concerned with having to employ a few minority workers.[1] To be sure, they appreciated the federal largess. Nonetheless, they wanted to receive the same 99% to 100% of the contracts under this new program in the same manner as

1. This concern is reflected in, *e.g.*, Associated General Contractors of Massachusetts v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

they had received 99% to 100% of all construction contracts in the past.

In response to the challenges, the lower federal courts, virtually without exception, upheld the MBE ten percent set aside as lawful and constitutional.[2]

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2. In addition to the court below, Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), the only other courts of appeals that have confronted the MBE ten percent set aside have upheld it. Ohio Contractors Association v. Economic Development Administration, 580 F.2d 213 (6th Cir. 1978); Constructors Association of Western Pa. v. Kreps, 573 F.2d 811 (3d Cir. 1978).

Eleven district courts have rejected challenges to the statute. Cases upholding the constitutionality of the challenged provision are: Rhode Island Chapter, Associated General Contractors of America v. Kreps, 450 F.Supp. 338 (D.R.I. 1978); Associated General Contractors of Kansas v. Secretary of Commerce, No. C.A.77-4218 (D.Kan. Feb. 9, 1978); Indiana Constructors, Inc., v. Kreps, No.IP 77-602-C (S.D.Inc. Jan. 4, 1979); Associated General Contractors of America, Inc. Alaska Chapter v. Kreps, No. F78-1 (D.Alas. Oct. 10, 1978), appeal filed, No. 78-3421 (9th Cir. Oct. 19, 1978); Frank Coluccio Construction Co. v. Kreps, No. F78-9-Civ. (D.Alas. Oct. 5, 1978).

Decisions denying preliminary injunction are: A.J. Raisch Paving Co. v. Kreps, No. 77-3977 (N.D.Cal. Dec. 15, 1977), appeal filed, No. 77-2497 (9th Cir. Dec. 20, 1977); Florida East Coast Chapter, Associated General Contractors of America v. Secretary of Commerce, No. C.A.77-8351

Given the uniqueness of this legislation, and in view of this Court's decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), it is apparent that the near unanimity among the lower courts is correct. The MBE ten percent set aside is consistent with and lawful under Title VI of the Civil Rights Act of 1964, and it is constitutional under the Fifth Amendment.

(S.D.Fla. Nov. 3, 1977); General Building Contractors Ass'n v. Kreps, No. C.A.77-3682 (E.D. Pa. Dec. 9, 1977); Virginia Chapter, Associated General Contractors of America, Inc. v. Kreps, 444 F.Supp. 1167 (W.D.Va. 1978); Carolinas Branch, Associated General Contractors of America v. Kreps, 442 F.Supp. 392 (D.S.C. 1977); Michigan Chapter, Associated General Contractors of America, Inc. v. Kreps, No. C.A.M-77-165 (W. D.Mich. Jan. 4, 1978).

Three district courts have rendered decisions adverse to the constitutionality of the statute: Wright Farms Construction, Inc. v. Kreps, 444 F.Supp. 1023 (D.Vt. 1977) (unconstitutional as applied); Montana Contractors Association v. Secretary of Commerce, 460 F.Supp. 1174 (D.Mont. 1979) (unconstitutional as applied); Associated General Contractors of California v. Secretary of Commerce, 441F.Supp. 955 (C.D.Cal. 1977), vacated and remanded for determination of mootness, 438 U.S. 909 (C.D.Cal. 1978), appeals filed, Nos. 78-1107, 78-1108, 78-1114 (Nov. 17, 1978) (unconstitutional on its face).

I. THE MBE TEN PERCENT SET ASIDE IS CONSISTENT WITH TITLE VI AND LAWFUL IN VIEW OF THE CONTROLLING PRINCIPLE THAT SUBSEQUENT SPECIFIC CONGRESSIONAL ENACTMENTS PREVAIL OVER PRIOR GENERAL ONES

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), this Court was divided on the issue of whether Title VI's ban on racial discrimination prohibited a race conscious set aside favoring racial minorities. The Court's division in Bakke is irrelevant here. Whatever Congress may have intended in 1964, it is patent that Congress in 1977 perceived no conflict between Title VI's ban on discrimination and the ten percent set aside in the Public Works Employment Act of 1977. Even if any such conflict existed, the ten percent set aside would be lawful under the controlling principle that subsequent specific legislative enactments prevail over former general ones. See pp. 56-59, infra.

The immediate predecessor of the Public Works Employment Act of 1977 was the Local Public Works Capital Development and Investment Act of 1976, Pub.L.

No. 94-369 (July 22, 1976), 90 Stat. 999, 42 U.S.C. §§6701, et seq. When Congress enacted the 1976 Act, it added a Title VI nondiscrimination provision similar to those added to virtually all laws authorizing the expenditure of federal monies by state and local governments.[1] This provision, contained in §207(a) of the Act, 90 Stat. 1007, 42 U.S.C. §6727 (a), is virtually identical to the nondiscrimination provision contained in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.[2] Congress continued

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1. The nondiscrimination provision provided as follows:

> "No person in the United States shall, on the grounds of race, religion, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this subchapter." 42 U.S.C. §6727(a).

2. The nondiscrimination provision in Title VI provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. §2000d.

this parallel by requiring that the nondiscrimination provision in the 1976 Act be enforced in the same discretionary manner as Title VI is enforced.[3]

The following year, Congress substantially amended the 1976 Act by enacting the Public Works Employment Act of 1977, Pub.L. No. 95-28 (May 13, 1977), 91 Stat. 116, 42 U.S.C. §§6710, et seq., as amended. See pp. 8 - 10, supra. Among the amendments added by Congress in 1977 was the MBE ten percent set aside amendment, added by §103 of the 1977 Act, 91 Stat. 117, 42 U.S.C. §6705(f)(2), as amended. When it added this amendment, Congress saw no reason to alter the Act's nondiscrimination provision barring discrimination on grounds, inter alia, of race, color and national origin in "any program or activity" funded under

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The only difference between this provision and the nondiscrimination provision in the 1976 Act, *see* note 1, *supra*, is that the latter added religion and sex to the grounds of prohibited discrimination.

3. *Compare* the enforcement procedures in 207 (b)&(c) of the 1976 Act, 90 Stat. 1008, 42 U.S.C. §6727(b)&(c) with the nearly identical procedures under Title VI, 42 U.S.C. §2000d-1.

the Act, 42 U.S.C. §6727(a), as amended. And Congress did not change the use of Title VI procedure to enforce the nondiscrimination provision.[4] There, of course, was no need to do so since Congress viewed the MBE ten percent set aside as consistent with nondiscrimination.

When Representative Parren Mitchell introduced the ten percent set aside in the House, he reviewed the historical exclusion of minority business enterprises

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4. Interestingly, Congress several days later did change the enforcement procedures under the Act through enactment of another piece of legislation. Specifically, Congress strengthened the procedures by making enforcement not discretionary, as under Title VI, but mandatory through incorporation of the compulsory enforcement procedures contained in §§122, 124 and 125 of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §§1242, 1244 and 1245, as amended. *See* 91 Stat. 166-167, 42 U.S.C. §6727, as amended.

The legislative vehicle for this change was the Intergovernmental Antirecession Act of 1977, an Act attached to the omnibus Tax Reduction and Simplification Act of 1977, Pub.L. No. 95-30 (May 23, 1977), 91 Stat. 126. In §605 of the omnibus Act, Congress slightly altered the nondiscrimination provision of §207(a) of the Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. §6727(a), by adding age and handicapped status to the grounds of prohibited discrimination; and significantly strengthened the enforcement provisions in 207(b), 42 U.S.C. §6727(b), by incorporating the mandatory procedures in the State and Local Fiscal Assistance Act. *See generally*, 91 Stat. 166-167, 42 U.S.C. §6727, as amended.

from government contracting and observed that the set aside was "an excellent opportunity to begin to remedy this situation." 123 Cong.Rec. H. 1436-37 (daily ed. Feb. 24, 1977). He added that the set aside was not discriminatory especially in view of the fact that"[t]he 8-A set aside under SBA has been tested in the courts more than 10 times and has been found to be legitimate and bona fide." Id. Representative Mario Biaggi supported the set aside precisely because it was nondiscriminatory; in fact, "without adoption of this amendment, this legislation may be potentially inequitable to minority businesses and workers." 123 Cong.Rec. H. 1440 (daily ed. Feb. 24, 1977).

Senator Edward Brooke, author of the ten percent set aside in the Senate, was even more to the point. At the outset, he observed that "the Federal Government, for the last ten years in programs like SBA's 8(a) set-asides, and the Railroad Revitalization Act's minority resources centers, to name a few, has accepted the set aside concept

as a legitimate tool to insure participation by hitherto excluded or unrepresented groups." 123 Cong.Rec. S.3910 (daily ed. March 10, 1977). In view of this background, the amendment was neither discriminatory nor "a limitation. Rather, it [was] designed to facilitate greater equality in contracting." Id. (emphasis added).

Throughout the debates on the ten percent set aside, no Member of Congress saw the set aside as discriminatory. Instead, the only concern about the amendment was its effect in areas where there were few or no minority business enterprises, a concern that was wholly assuaged because of the waiver provisions in the amendment. See pp. 31-32, 37-38, supra. Assured that the set aside amendments would work no inequality but instead would facilitate greater equality, Congress adopted the set aside without any opposition whatsoever.

The Congress that enacted the ten percent set aside in 1977 quite obviously perceived no conflict between the set aside and the nondiscrimination provisions

contained in the 1977 Act itself or in Title VI.

Even if one assumes a direct conflict--which there is not--between the general anti-discrimination provisions of the Public Works Employment Act of 1977 at issue herein,[5] the subsequent, specific statute must be given precedence. If, as petitioners argue,[6] a basic inconsistency exists between the 1964 and 1977 Acts, traditional canons of statutory construction compel this Court to give effect to a subsequent Congressional enactment which is more specific in scope. See, e.g., Morton v. Mancari, 417 U.S. 535, 549 (1974). Where, as under petitioners' view, "the earlier and later statutes are irreconcilable;"[7] the last expression of legislative will must generally be respected. Of course, a specific expression of legislative will controls over a general statute without regard to priority of enactment. Id. at 550-551. See also, Radzanower v. Touche Ross & Co., et al., 426 U.S. 148, 154-155 (1976); Bulova Watch Co. v. United States, 365 U.S. 753 (1961). However, where, as here, the subsequent statute is more specific than the prior enactment, courts may not ignore the more recent expression of legislative will.

Petitioners argue that a Federal judge is free to disregard a subsequent, more specific Congressional enactment whenever the judge believes "the latter more particularized statute is less conducive to the public welfare." Brief for the Petitioners at 37.

Nothing could be further from the proper exercise of federal judicial power. As Chief Justice Burger noted

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5. Of course, this Court should attempt to give effect to both the 1964 and 1977 acts by recognizing that no conflict exists between them. *See generally*, Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Morton v. Mancari, 417 U.S. 535, 549 (1974); Posadas v. National City Bank, 296 U.S 497 (1936).

6. Petitioners argue:
"The applicability of the Civil Rights Act clearly indicates that the MBE provision in the instant statute must be struck down because, most obviously, it cannot co-exist with the applicable provision of Title VI." Brief for Petitioners at 38.

7. Morton v. Mancari, *supra*, at 550.

for this Court in Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978):

> "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.
>
> * * *
>
> "*[I]*n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our constitution vests such responsibilities in the political branches." *Id.* at 194-195.

II. THE MBE TEN PERCENT SET ASIDE, WHICH HAS NEITHER A DISCRIMINATORY EFFECT NOR A DISCRIMINATORY PURPOSE, IS CONSTITUTIONAL UNDER THE STANDARDS APPLIED IN UNITED JEWISH ORGANIZATIONS BY JUSTICES WHITE, STEVENS AND REHNQUIST, AND BY JUSTICES STEWART AND POWELL

Race conscious numerical measures, contrary to the petitioners' arguments to this Court,[1] are not unconstitutional per se. United Jewish Organizations v. Carey ["UJO"], 430 U.S. 144 (1977). Indeed, before the petitioners can invoke even the intermediate standard of review by this Court, they must show that the challenged classification has both a racially discriminatory purpose and at least a probable racially discriminatory effect. Id. See also, Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976); Palmer v. Thompson, 403 U.S. 217 (1971). They have shown and can show neither.

The use of benign racial measures by government agencies has been sanctioned

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1. *See* Brief for Petitioners at 9.

by this Court in a number of settings. Particularly wide latitude has been extended to school boards in assigning pupils and to states in drawing reapportionment boundaries.

As to pupil assignment, this Court in McDaniel v. Barresi, 402 U.S. 39 (1971), held that school boards, regardless of any findings of past discrimination, are empowered to assign students on the basis of race in order to enhance minority representation in otherwise predominantly white schools. See also, North Carolina Board of Education v. Swann, 402 U.S. 43 (1971).[2]

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2. This point was reiterated by Chief Justice Burger speaking for a unanimous Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." 402 U.S. at 16.

Similar to the manner in which school boards may voluntarily use race conscious numerical measures, reapportionment may be undertaken by a state using race conscious numerical measures.[3]

The underpinnings of these decisions are not that race conscious numerical measures may be used only by school boards or states. Rather, their constitutionality hinges upon the racial fairness of the practice. More particularly, as explained in UJO, their constitutionality results from their being discriminatory neither in purpose nor in effect.

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3. In his plurality opinion in United Jewish Organizations v. Carey, 430 U.S. 144 (1977), Justice White stated:

> "[W]e think it also [is] permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority." 430 U.S. at 168 (plurality opinion of White, J., joined by Rehnquist and Stevens, JJ.).

The issue in UJO centered upon a revised racial plan adopted by the State of New York in an effort to guarantee minority political representation in the state legislature[4] and to comply with the Voting Rights Act. One result of the revised plan was that a Hassidic Jewish community previously within a single, predominantly white assembly

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4. As described by the Court:

> " The revised 1974 plan, in its essentials, did not change the number of districts with nonwhite majorities, but did change the size of the nonwhite majorities in most of those districts. Under the 1972 plan, Kings County had three state senate districts with nonwhite majorities of approximately 91%, 61%, and 53%; under the revised 1974 plan, there were again three districts with nonwhite majorities, but now all three were between 70% and 75% nonwhite. As for state assembly districts, both the 1972 and the 1974 plans provided for seven districts with nonwhite majorities. However, under the 1972 plan, there were four between 85% and 95% nonwhite, and three were approximately 76%, 61% and 52%, respectively; under the 1974 plan, the two smallest nonwhite majorities were increased to 65% and 67.5%, and the two largest nonwhite majorities were decreased from greater than 90% to between 80% and 90%." 430 U.S. at 151-152 (footnotes omitted).

district was split by new legislative boundaries separating portions of that community into assembly districts that were at least 65% minority. Over the objections of the white community, which sued to invalidate the revised plan as discriminatory, this Court upheld the plan as an appropriate race conscious numerical measure.

At the outset of his plurality opinion in UJO, Justice White rejected the white community's arguments that racial criteria were inherently unconstitutional.

> "Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any per se rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." 430 U.S. at 161 (plurality opinion of White, J., joined by Brennan, Blackmun and Stevens, JJ.) (footnote omitted).

As Justice White summarized, "a reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in

establishing a certain number of black minority districts." 430 U.S. at 162 (plurality opinion of White, J., joined by Brennan, Blackmun and Stevens, JJ.).

In Justice White's view, the racial redistricting plan in UJO was constitutional, at least in part, because it was consistent with the Voting Rights Act, a law which the Court had earlier upheld as constitutional. Katzenbach v. Morgan, 384 U.S. 301 (1966).[5] Yet, regardless of the Act, it also was constitutional because there was no discriminatory purpose or effect.

Speaking for himself and Justices Rehnquist and Stevens, Justice White conceded that the plan was race conscious, but because the plan did not stigmatize and did not fence out whites, it was constitutional:

> "There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma

5. For a discussion of how these decisions compel the constitutionality of the 10% set aside, *see* pp. 82-85, *infra*.

> with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment....
>
> "It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength.... [E]ven if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population." 430 U.S. at 165-166 (plurality opinion of White, J., joined by Rehnquist and Stevens, JJ.) (citations omitted).

Justices Stewart and Powell also voted to uphold the racial plan in UJO for the same reason: there was no discriminatory purpose or effect. At the outset, they observed that the constitutional "question is whether the reapportionment plan represents purposeful discrimination," and they noted that discriminatory "impact may afford some evidence that an invidious purpose was present." 430 U.S. at 179 (concurring opinion of Stewart, J., with Powell, J.).

The evidence failed to establish either condition:

> "But the record here does not support a finding that the redistricting plan undervalued the political power of white voters relative to their numbers in Kings County. That the legislature was aware of race when it drew the district lines might also suggest a discriminatory purpose. Such awareness is not, however, the equivalent of discriminatory intent....
>
> "Having failed to show that the legislative reapportionment plan had either the purpose or the effect of discriminating against them on the basis of their race, the petitioners have offered no basis for affording them the constitutional relief they seek." 430 U.S. at 179-180 (concurring opinion of Stewart, J., with Powell, J.) (citation omitted).

The MBE ten percent set aside here is no different from the racial redistricting plan in UJO. To be sure, Congress used race in a purposeful manner. But race consciousness is not the equivalent of discriminatory purpose. The undeniable purpose was not to discriminate but to reduce minority unemployment, to enhance minority business enterprises, and to turn around the near total exclusion of MBEs from government contracting. The ten percent set aside--giving minority

businesses at long last a fair shake--could hardly be characterized as a slur or stigma with regard to whites or minorities.

Finally, there is no evidence in this record that the MBE ten percent set aside fenced out white contractors or in any way undervalued their political and economic power. Quite to the contrary, the Public Works Employment Act of 1977, a new program, added billions of dollars to their coffers--billions of dollars that would have been unavailable but for passage of the Act.

Without a discriminatory purpose or effect, the MBE ten percent set aside cannot be said to have caused any discrimination against white contractors. As such, the MBE ten percent set aside is per se constitutional.

III. THE MBE TEN PERCENT SET ASIDE ALSO IS CONSTITUTIONAL UNDER THE INTERMEDIATE STANDARD OF REVIEW APPLIED IN BAKKE BY JUSTICES BRENNAN, WHITE, MARSHALL AND BLACKMUN

Assuming arguendo that this Court characterizes the MBE ten percent set aside as having an invidious purpose and a discriminatory effect, the constitutionality of the benign set aside must be reviewed under the "intermediate" standard of review applied by Justices Brennan, White, Marshall and Blackmun in Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Just as the strict standard of review was deemed inapplicable to the benign classification in Bakke, so too is it inapplicable here. Additionally, the strict standard of review applied by Justice Powell in Bakke is not appropriate here where there are legislative findings of severe minority underrepresentation in government contracting.

Under the intermediate standard of review, the MBE ten percent set aside is constitutional because it does not stigmatize any group and it is necessary to

remedy substantial and chronic minority underrepresentation in government contracting.

A. Because the MBE Ten Percent Set Aside Is Similar in Formulation and Purpose to the Sixteen Percent Special Admissions Program at Issue in Bakke, the Intermediate Standard of Review Is Applicable Here

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), four of the five members of this Court who reached the constitutional issue declined to review the University's race conscious admissions program under the strict scrutiny standard of review. Neither Allan Bakke nor "whites as a class have any of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" 438 U.S. at 357 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (citations omitted).

Yet, the same four Justices also declined to review the University's racially benign program under the lenient rational basis standard of review. As Justices Brennan, White, Marshall and Blackmun observed: "'"[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."'" 438 U.S. at 358-359 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (citations omitted).

Wisely, Justices Brennan, White, Marshall and Blackmun adopted for benign racial classifications an "intermediate" standard of review--the standard applied to gender classifications. Specifically, "racial classifications designed to further remedial purposes '"must serve important governmental objectives and must be substantially related to achievement of those objectives."'" Id. (citations omitted). In addition,

> "because of the significant risk that racial classifications established for benign purposes can be misused...[further inquiry is necessary] to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." 438 U.S. at 361 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

The benign program at issue in Bakke was an admissions program which set aside sixteen percent of the places in entering medical school classes for disadvantaged minority applicants. The program at issue here, the MBE ten percent set aside, is virtually identical in its benign purposes. As summarized by Representative Biaggi during the House debates on the MBE ten percent set aside:

> "What the amendment seeks to do is guarantee that at least 10 percent of all funds in this legislation will go to contracts which will be awarded to minority business enterprises. This is not an unreasonable demand--in fact it is quite modest. If implemented however it could have great benefits to the entire minority community. Fiscal year 1976 figures indicate that less than 1 percent of all Federal procurement contracts went to minority business enterprises. This is a situation which must be [r]emedied.

"The objectives of this legislation are both necessary and admirable. Yet without adoption of this amendment, this legislation may be potentially inequitable to minority businesses and workers. It is time that the thousands of minority businessmen enjoyed a sense of economic parity. This amendment will go a long way toward helping to achieve this parity and more importantly to promote a sense of economic equality in this Nation." 123 Cong.Rec. H.1440 (daily ed. Feb. 24, 1977).

Just as the University's sixteen percent set aside admissions program at issue in Bakke was generated by benign purposes, so too is the MBE ten percent set aside a benign program reviewable by this Court under the "intermediate" standard of review.

B. The Intermediate Standard of Review Is Applicable Because--as Justice Powell Pointed Out in Bakke--the Racial Classification Here Is Premised upon Congressional Findings of Severe Minority Underrepresentation in Government Contracting

Application of the intermediate standard of review adopted for benign racial classifications by Justices Brennan, White, Marshall and Blackmun was not ruled out by Justice Powell in Bakke.

True, Justice Powell did apply strict scrutiny review to the race conscious admissions program at issue in Bakke, but he strongly implied that a lesser standard of review might be appropriate where there have been judicial, legislative or administrative findings of past discrimination or underrepresentation. 438 U.S. at 299-305 (opinion of Powell, J.).

Since the findings deemed necessary by Justice Powell were absent in Bakke, he chose not to apply a lesser standard of review to the University's benign program. Id. Here, however, there are both legislative and administrative findings made by government bodies charged with making such findings. Thus, under Justice Powell's own criteria, the intermediate standard of review for benign classifications is appropriate here.

For the most part, Justice Powell in Bakke referred to findings of "past discrimination" or of "unconstitutional discrimination." But the cases he relied on indicate that his views more broadly encompass findings of minority underrep-

resentation and include remedial measures certainly not limited to identified victims of past discrimination.

The crucial findings here of course are legislative and administrative.[1]

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1. With regard to the judiciary, Justice Powell in Bakke stated with approval that the courts "have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. *E.g.*, *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (CA2 1973); *Carter* v. *Gallagher*, 452 F.2d 315 (CA8 1972), modified on rehearing en banc, *id.*, at 327." 438 U.S. at 301 (opinion of Powell, J.). In both Bridgeport and Carter there in fact had been judicial findings of past discrimination, but the race conscious numerical remedies were in no way limited to identified victims of that discrimination.

In Bridgeport, the district court had found that the written tests used to screen minority applicants from 1965 to 1970 for the position of police officer were discriminatory, not job related, and hence unlawful. In order to overcome this past discrimination, the district court imposed and the court of appeals approved a rigid remedy not limited to identified victims. With minority representation in the Bridgeport population at 25%, and minority representation in the Bridgeport Police Department then at only 3.6%, the court set a goal of 15% minority police officers. In order to reach this 15% goal, future minority applicants were to be placed in a separate minority pool: 50% of

Addressing such findings in Bakke, Justice Powell stated with approval that racial "preferences also have been upheld

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the next ten vacancies were to be filled from the minority pool; 75% of the next twenty vacancies were to be filled from the minority pool; and 50% of the vacancies thereafter were to be filled from the minority pool (alternatively hiring one minority and one white) until the goal was reached. 482 F.2d 1333 (2d Cir. 1973).

Carter is similar although the remedy was more strongly disputed. There the district court had found extensive, unlawful employment discrimination in the Minneapolis Fire Department. In order to overcome this past discrimination, the district court imposed a remedy not limited to identified victims of the identified discrimination. With minority representation in the Minneapolis population at 6.4%, and with no minority representation in the Fire Department, the district court set a goal of 3.7% and ordered that it be met by filling the next available twenty positions with minority applicants. A panel of the court of appeals, noting that there were no identified victims as plaintiffs and that the preference would benefit minorities generally, 452 F.2d at 325-326, reversed the absolute preference. Thereafter, the court of appeals *en banc*, again conceding that there were no identifiable victims of the discrimination, 452 F.2d at 328, approved a remedy by which 33% of the future hires would be minority applicants until twenty minority persons were hired and the 3.7% goal attained. The Supreme Court denied *certiorari*, 406 U.S. 950 (1972).

where legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. E.g., Contractors Association of Eastern Pennsylvania v Secretary of Labor, 442 F2d 159 (CA3), cert denied, 404 US 854 (1971); Associated General Contractors of Massachusetts, Inc. v Altshuler, 490 F2d 9 (CA1 1973), cert denied, 416 US 957 (1974); cf., Katzenbach v. Morgan, 384 US 641 (1966)." 438 U.S. at 301-302 (opinion of Powell, J.) (footnote omitted). In footnote 41, Justice Powell extended this commentary by observing that Bakke did "not call into question congressionally authorized administrative actions, such as...approval of reapportionment plans under §5 of the Voting Rights Act of 1965.... In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, e.g., South Carolina v Katzenbach, 383 U.S. 301, 308-310 (1966)." 438 U.S. at 302 n.41 (opinion of Powell, J.).

For the most part, the cases relied on by Justice Powell involved no legislative or administrative findings of past unlawful or unconstitutional discrimination. Thus, these cases provide overwhelming support for the implication that findings of underrepresentation are sufficient.

Although there are pretensions in Contractors Association and in Altshuler that the race conscious numerical measures were based on identified past discrimination, there in fact were no legislative or administrative findings other than of underrepresentation.

In Contractors Association, the court upheld the goals and timetables imposed as bid conditions upon Philadelphia area construction contractors by the Office of Federal Contract Compliance pursuant to the United States Department of Labor's interpretation of Executive Order 11246--which requires contractors on federally assisted construction projects to "take affirmative action."[2]

2. As summarized by the court, the Department of Labor in June 1967 issued an order implement-

The goals and timetables, which became known as the Philadelphia Plan,

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ing the Executive Order in the Philadelphia area by requiring contract bidders "to submit 'acceptable affirmative action' programs 'which shall include specific goals of minority manpower utilization.'" Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, 163 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The Department of Labor order delegated to an area office of the Office of Federal Contract Compliance the authority to set specific goals, and set forth the factors by which those goals were to be determined including:

> "'1) The current extent of minority group participation in the trade.
>
> 2) The availability of minority group persons for employment in such trade.
>
> 3) The need for training programs in the area and/or the need to assure demand for those in or from existing programs.
>
> 4) The impact of the program upon the existing labor force.'" 442 F.2d at 163-164.

In August 1969, three days of hearings were held to determine the appropriate goals under the foregoing criteria; and in September 1969, the goals for minority manpower utilization were determined for six of the skilled building trades. The goals actually were ranges imposed in steps over a four-year period. For example, required minority representation in the elevator construction workers increased from a range of 4%-8% in 1970 to a range of 19%-23% in 1973; in the ironworkers the goal was 5%-9% in 1970 and 22%-26% in 1973. 442 F.2d at 164.

were imposed without findings of past discrimination or even a formal identification of past discrimination.[3] Instead, the focus had been simply on the exclusion of minorities from the trades. For example, the Department of Labor found that "'there traditionally has been only a small number of Negroes employed in these...trades.'" 442 F.2d at 164. In the court's view, this finding and related data alone "may have been sufficient to justify administrative action leading to the specification of contract provisions." 442 F.2d at 177. But the court did not have to rely only on historical generalizations, for there also were administrative findings of severe minority underrepresentation.[4]

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3. As a result of the August 1969 hearings, the Office of Federal Contract Compliance, in September 1969, found that minority representation in the population of the five-county Philadelphia area was 30% while the minority representation in the six building trades was approximately 1%, and further "that this obvious underrepresentation was due to the exclusionary practices of the unions representing the six trades." 442 F.2d at 173.

4. These findings, "revealing the percentages of utilization of minority group tradesmen in

Associated General Contractors of Massachusetts, Inc. v. Altshuler, supra, presents a similar factual situation. There, the Massachusetts Department of Transportation and Construction, under the authority of gubernatorial Executive Order 74, determined that the federally approved affirmative action plan applicable to the building trades under Executive Order 11246 was inadequate to assure minority representation and that the state thereby needed a stricter plan which would apply to state construction projects. Based not upon any identified past discrimination but instead only upon "an assessment of current availability of minority journeymen, apprentices, and trainees," 490 F.2d at 19, the state required that on any construction project located in any area of high minority

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the six trades compared with the availability of such tradesmen in the five-county area, justified issuance of the order without regard to a finding as to the cause of the situation.... A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual remedial action." 442 F.2d at 177.

concentration there be "'a not less than twenty percent ratio of minority employee man hours in each job category,'" and that contractors take "'every possible measure to achieve compliance.'" 490 F.2d at 11. Although this 20% goal was imposed without any timetables and without any proposed termination date, the court added an open-ended termination date: "If, at some future time, racial balance were to be achieved in Boston's construction trades, we assume that there would no longer exist a compelling need for remedial action." 490 F.2d at 18 n.16. Similar to the federally imposed Philadelphia Plan, the state-imposed Massachusetts Plan was not predicated or premised upon findings of past discrimination or even an identification of past discrimination. But, as in Philadelphia, there were administrative findings of severe minority underrepresentation in the building trades.[5]

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5. Those findings "revealed that despite the existence of the federal Boston Plan, minority membership in all of the nineteen participating unions amounted to less than four per cent of union membership, while minorities comprised approximately twenty-three percent of the popu-

The Katzenbach cases present a similar pattern and are illustrative not only of Congress' broad powers to enact race conscious legislation but also of the minimal findings of underrepresentation required to support remedial legislation. These cases upheld the constitutionality of various provisions of the Voting Rights Act of 1965 as a proper exercise of Congressional power. The purpose of the Act, of course, was to enhance the voting rights of minorities.

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lation of Boston." Associated General Contractors of Massachusetts v. Altshuler, 490 F.2d 9, 13 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). On the basis of these statistical findings and other statistical data, "the district court concluded that racial imbalance does exist in the Boston construction trades and such imbalance is the result of past discriminatory practices on the part of many 'entities' in that industry." 490 F.2d at 18 n.15. The court of appeals elevated the statistical findings and the district court's conclusion yet another step: "It is undisputed that past racial discrimination in Boston's construction trades is in large part responsible for the present racial imbalance." 490 F.2d at 21. Despite these gratuitous findings, the race conscious Massachusetts Plan was imposed and upheld not on the basis of identified past discrimination but only upon findings of severe minority underrepresentation.

In South Carolina v. Katzenbach, 383 U.S. 301 (1966), South Carolina challenged §4 of the Act on the ground that there had been no unlawful or unconstitutional voting discrimination in the state and on the ground that there was an insufficient nexus between any past violations and the formula used to determine current coverage by the Act. The Court conceded that only in three states had the "federal courts... repeatedly found substantial voting discrimination," 383 U.S. at 329 (footnote omitted), and that the inclusion of South Carolina was based only upon "fragmentary evidence of recent voting discrimination mainly adduced by the Justice Department and the Civil Rights Commission," 383 U.S. at 329-330 (footnote omitted). Nonetheless, the presence or absence of past constitutional violations was not crucial. "In identifying most evils, Congress obviously may avail itself of information from any probative source." 383 U.S. at 330. Additionally, application of that formula to South Carolina and to other jurisdictions was proper "at least in the absence of proof that they have been free

of substantial voting discrimination in recent years." Id.

The Court in Katzenbach v.Morgan, 384 U.S. 641 (1966), addressed a similar issue: whether §4(e) of the Voting Rights Act, which had the effect of invalidating a New York law requiring English literacy as a prerequisite to voting, was constitutional. New York argued that Congress was without power to invalidate the English literacy requirement, because the law had not been judicially determined to be in violation of the Fourteenth Amendment. The Court rejected this argument, holding that neither judicial nor legislative findings of unconstitutional discrimination were necessary to sustain the remedial race conscious provisions of the Act.

Justice Powell's approval in Bakke of Contractors Association, Altshuler and the Katzenbach cases indicates that he would not apply strict scrutiny review to benign race conscious programs premised upon administrative or legislative findings of severe minority underrepresentation. Regents of the University of Cali-

fornia v. Bakke, 438 U.S. 265, 301-303 (1978).

Here, of course, there is no doubt that the MBE ten percent set aside is premised both upon administrative findings and on legislative findings of chronic minority underrepresentation in government contracting.

In its report to Congress, the U.S. Commission on Civil Rights stated that fewer than 1% of all federal procurement contracts and fewer than 1% of all state and local government contracts were awarded to minority business enterprises.[6] Congress' watchdog, the Government Accounting Office, made nearly identical findings and reported that the SBA's Section 8(a) Program was inadequate to remedy the chronic underrepresentation.[7]

Similar findings were used by Congress to support the need for the MBE ten percent set aside. Representative Parren Mitchell, author of the set aside,

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6. U.S. Commission on Civil Rights, Minority and Women as Government Contractors, at vii (May 1975).

7. GAO Report to Congress: Questionable Effectiveness of the 8(a) Procurement Program at 4 (April 1975).

stressed on the floor of the House that the "average percentage of minority contracts, of all government contracts, in any given fiscal year, is 1 percent--1 percent. That is all we give them." 123 Cong.Rec. H. 1437 (daily ed. Feb. 24, 1977).[8]

Given the administrative and legislative findings here--findings which were absent in Bakke--it would be inappropriate to review the benign MBE ten percent set aside under the strict scrutiny standard of review. The appropriate standard is the intermediate standard already adopted by Justices Brennan, White, Marshall and Blackmun.

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8. Representative Mario Biaggi supplemented this record:

> "This Nation's record with respect to providing opportunities for minority businesses is a sorry one. Unemployment among minority groups is running as high as 35 percent. Approximately 20 percent of minority businesses have been disolved [sic] in a period of economic recession. The consequences have been felt in millions of minority homes across the Nation.
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> * * *
>
> "Fiscal year 1976 figures indicate that less than 1 percent of all Federal procurement contracts went to minority business enterprises. This is a situation which must be [r]emedied." 123 Cong. Rec. H. 1440 (daily ed. Feb. 24, 1977).

C. The MBE Ten Percent Set Aside Is Necessary To Remedy Substantial and Chronic Minority Underrepresentation in Government Construction Contracting and It Does Not Stigmatize Any Group

Both elements of the intermediate standard of review are met by the MBE ten percent set aside. It is premised upon an important, articulated purpose. And it does not stigmatize any group.

In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), four members of this Court held that the University's sixteen percent set aside satisfied the first prong of the intermediate review test. As summarized by Justice Brennan, the University's "articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities...." 438 U.S. at 362 (opinion

of Brennan, J., with White, Marshall and Blackmun, JJ.). Here, as in Bakke, the race conscious program serves the important, articulated purpose of remedying past societal discrimination.

The continuing effects of past societal discrimination are undeniable in a society in which "during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination." 438 U.S. at 387 (opinion of Marshall, J.). See also, Sedler, "Beyond Bakke: The Constitution and Redressing the Social History of Racism," 14 Harv.Civ. Rights--Civ.Lib.L. Rev. 133 (1979). The history of extreme discrimination in the skilled building trades--the training ground for future contractors--is especially well documented. In fact, "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make exclusion a proper subject for judicial notice." United Steelworkers of America v. Weber, 61 L.Ed.2d 480, 486 n.1 (1979).

As a result of societal discrimina-

tion within the construction industry in particular, minority contractors have had an especially difficult time getting their feet in the door. As Representative John Conyers stated during the debates on the MBE ten percent set aside,

> "minority contractors and businessmen who are trying to enter in on the bidding process...get the 'works' almost every time. The sad fact of the matter is that minority enterprises usually lose out.... [T]hrough no fault of their own, [they] simply have not been able to get their foot in the door." 123 Cong.Rec. H. 1440 (daily ed. Feb. 24, 1977).

Governments at all levels--federal, state, county, municipal--have done little to alter the pervasive effects of this discrimination and exclusion. For the most part, they have subsidized and entrenched past exclusionary patterns.

Recognizing the exclusionary practices of past contracting methods and the perpetuation of past discrimination, Congress also recognized the opportunity presented to alter the record of substantial and chronic exclusion. "In the present legislation before us, it seems to me that we have an excellent opportunity to begin to remedy this situation." Rep. Mitchell, 123 Cong.Rec. H.1437 (daily ed. Feb. 24, 1977). Representative Biaggi echoed the need: "This is a situation that must be [r]emedied." Id. at 1440. He added, in view of the past, that the ten percent figure was "not an unreasonable [percentage]--in fact it is quite modest." Id.

The modest MBE ten percent set aside also satisfied the second part of the test in the intermediate standard in that it neither "stigmatizes any group [n]or ...singles out those least well represented in the political process to bear the brunt of [the] benign program." 438 U.S.

at 361 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

In Bakke, four members of this Court recognized that this "second prong of our test" was "clearly satisfied" by the sixteen percent set aside. In this regard the MBE ten percent set aside is identical.

The set aside obviously does not stigmatize whites. "Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second class citizens because of their color." 438 U.S. at 375 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (emphasis added). And there, of course, is no stigma attributable to the minority beneficiaries of the program especially since there is no question whatsoever about the qualifications of the minority business enterprises. Moreover, there is no stigma associated with the program

since it merely assures access to government contracts; as in Bakke, the "program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." Id. Even the petitioners here, it would seem, would admit that receipt of government contracts involves no stigma but rather enhances economic viability.

Finally, the MBE ten percent set aside does not single out any identified group which is underrepresented in the political process to bear the brunt of this benign program. In fact, with this program, as with the sixteen percent set aside in Bakke, it cannot be "even claimed that [the] program in any way operates to...single out any discrete and insular, or even any identifiable, nonminority group." 438 U.S. at 374 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.).

Like the sixteen percent set aside in Bakke, the MBE ten percent set aside herein fully satisfies both prongs of the intermediate standard of review applicable to benign race conscious

programs. As such, the MBE ten percent set aside is constitutional.

IV. EVEN IF THE STRICT SCRUTINY STANDARD OF REVIEW WERE APPLICABLE, THE MBE TEN PERCENT SET ASIDE STILL WOULD BE CONSTITUTIONAL

Although the intermediate standard of review is applicable to benign racial classifications, and although the MBE ten percent set aside satisfies the intermediate standard of review, the MBE ten percent set aside also would be constitutional under the strict scrutiny standard of review.

A. Under the Standards Applied by Justice Powell in Bakke, Congress Is Both Authorized and Competent To Find Minority Underrepresentation in Government Contracting and To Devise a Remedy for that Underrepresentation

In his opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Justice Powell indicated that the strict scrutiny standard of review was not necessarily applicable to benign racial classifications premised upon judicial, legislative or administrative findings of past discrimination

or severe minority underrepresentation. See pp.73 -86, supra. Nevertheless, even where strict scrutiny is applicable, Justice Powell also stated that the strict standard could be satisfied by a classification designed to remedy past practices--for a government "certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." 438 U.S. at 307 (opinion of Powell, J.). Again, however, Justice Powell referred to the necessity of appropriate governmental "findings", and he added the condition that the government body must be authorized and competent to make such findings:

> "[The University] does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any *legislative policy* or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of *legislative mandates and legislatively determined criteria*. *Cf. Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976); n.41, *supra*. Before relying upon these sorts

> of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. See, *e.g.*, *Califano* v. *Webster*, 430 U.S. at 316-321." 438 U.S. at 309 (opinion of Powell, J.) (footnote omitted; emphasis added).

Justice Powell's views leave no question that Congress--as a matter of constitutional authority--is authorized, capable and competent to make not only findings but also far reaching policy decisions. Mow Sun Wong stands for precisely this proposition. And Webster illustrates the minimal legislative findings necessary to support such policy decisions.

In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), this Court struck down a rule of the United States Civil Service Commission which denied aliens permanent employment in the competitive service. The Court's decision was based in part upon the role of the Commission. This occurred because the Commission had defended its discriminatory rule on numerous grounds relating to its pur-

ported role in foreign affairs and in immigration and naturalization. The Court rejected these proffered rationales since neither the President nor the Congress had authorized such a role for the Commission.[1] As the Court made clear, the Commission's role is quite limited and specific:

> "[T]he Commission performs a limited and specific function.
>
> The only concern of the Civil Service Commission is the promotion of an efficient federal service. In general it is fair to assume that its goals would be best served by removing unnecessary restrictions on the eligibility of qualified applicants for employment." 426 U.S. at 114, 115 (footnote omitted).

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1. The Court stated:

> "It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies. Indeed, it is not even within the responsibility of the Commission to be concerned with the economic consequences of permitting or prohibiting the participation by aliens in employment opportunities in different parts of the national market." 426 U.S. at 114.

The fact that the Commission's asserted interests for its discriminatory rule exceeded its legislatively authorized role was crucial. Indeed, the Court intimated that its result would have been different if the Commission's rule had been directly related to its interests, or if the President or the Congress had mandated the rule:

> "When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. That presumption would, of course, be fortified by an appropriate statement of reasons identifying the relevant interest. Alternatively, *if the rule were expressly mandated by the Congress or by the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption.*" 426 U.S. at 103 (emphasis added).

Here, of course, the Court is not faced with a mere rule promulgated by, for example, the Economic Development Administration or by the Small Business

Administration. Instead, as Justice Powell indicated was necessary in Bakke, 438 U.S. at 309 (opinion of Powell, J.), the MBE ten percent set aside is a "legislative mandate [with] legislatively defined criteria. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)."

Justice Powell's reliance on Califano v. Webster, 430 U.S. 313 (1977), as noted, illustrates the minimal legislative findings necessary to support a legislative mandate such as the MBE ten percent set aside. At issue in Webster was a provision of the Social Security Act which allowed a female wage earner, for social security benefit computation purposes, to "exclude from the computation of her 'average monthly wage' three more lower earning years than a similarly situated male wage earner could exclude." 430 U.S. at 315-316. Assuming that the female and the male had earned precisely the same amount of wages in the past, the differential computation "would result in a slightly higher 'average monthly wage' and a correspondingly higher level of old-age benefits for

the retired female wage earner." 430 U.S. at 316.

In Webster, this Court unanimously upheld the challenged provision on the basis of its legislative history. In the Court's view, the legislative history of the challenged provision "reveal[ed] that Congress directly addressed the justification for differing treatment of men and women...and purposefully enacted the more favorable treatment for female wage earners to compensate for past employment discrimination against women." 430 U.S. at 318. But the legislative history relied on by the majority to find that the challenged provision had been enacted "to remedy discrimination against women in the job market," 430 U.S. at 319, was a slim reed indeed. First, referring to the legislative history not of the challenged provision enacted in 1961, but of an analogous statutory differential enacted six years earlier, the Court cited a House Report which in turn cited a study by the United States Employment Service in the Department of Labor which "showed that

age limits are applied more frequently to job openings for women than for men and that age limits applied are lower." Id. Second, referring to subsequent legislative history in 1961 which related to the reason for the 1955 statutory differential, the Court cited a statement made by a legislator at a hearing which justified the earlier statutory differential on "the theory...that a woman at that age [62] was less apt to have employment opportunities than a man." Id. Based upon this legislative history --and none other--the Court concluded that "the legislative history is clear that the differing treatment of men and women" was not accidental, "but rather was deliberately enacted to compensate for particular economic disabilities suffered by women." 430 U.S. at 320.

The legislative history here supporting the MBE ten percent set aside of course is considerably more substantial than the two oblique references relied on by the Court to uphold the statutory preference in Webster. During the debates on the MBE ten percent set aside,

Members of Congress repeatedly referred to the need to remedy the high minority unemployment rate[2] and the need to remedy the government's exclusionary history of awarding less than 1% of all government contracts to minority business enterprises.[3] Both of these findings are reiterated in reports made to Congress by agencies authorized to do so.[4] Moreover, Congress presumably was aware of its own failed efforts to enhance the availability of federal contracts to minority business enterprises through the SBA's Office of Minority Business Enterprises and presumably was aware of the similar efforts of President Nixon through Executive Orders 11458, 11518 and 11625. Moreover, Congress, like the

2. 123 Cong.Rec. H.1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Biaggi); 123 Cong.Rec. S.3910 (daily ed. March 10, 1977) (remarks of Sen. Brooke).

3. *Id.* at 1436-37 (remarks of Rep. Mitchell).

4. *See, e.g.*, GAO Report to Congress: Questionable Effectiveness of 8(a) Procurement Program 32 (April 1975).

judiciary, could take appropriate notice of the extensive discrimination against minorities in the skilled building trades --the training ground for future construction contractors.[5]

That Congress is authorized, capable and competent to make the findings that it made and to try to remedy--minimally--some of that severe underrepresentation and past discrimination is unquestioned. Beyond a shadow of a doubt, Congress' enactment of the MBE ten percent set aside satisfies the criteria deemed necessary by Justice Powell in Bakke. The set aside is, therefore, constitutional.

B. The MBE Ten Percent Set Aside Furthers a Compelling Governmental Purpose and No Less Restrictive Alternative Is Available

Aside from the fact that Congress is authorized, capable and competent to remedy minority underrepresentation or

5. 123 Cong.Rec. H.1440 (daily ed. Feb. 24, 1977) (remarks of Rep. Conyers).

past discrimination, the MBE ten percent set aside also is constitutional under strict judicial scrutiny for it meets all the necessary criteria.

As Justice Powell summarized in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), for a classification to pass strict scrutiny, the government "'must show that [1 & 2] its purpose or interest is both constitutionally permissible and substantial, and that [3] its use of the classification is "necessary. . . to the accomplishment" of its purpose or the safeguarding of its interest.'" 438 U.S. at 305 (opinion of Powell, J.) (citations omitted) (ellipsis in original). Additionally, as Justice Brennan pointed out in Bakke, a suspect classification can be justified "even then, [4] only if no less restrictive alternative is available." 438 U.S. at 357 (opinion of Brennan, J., with White, Marshall and Blackmun, JJ.) (footnote omitted). The MBE ten percent set aside meets all of these criteria.

1. The Purpose is Constitutionally Permissible

As discussed at pp.94-103, supra, there is no question that Congress has the power to enact race conscious remedial legislation. Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966); see also, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). Moreover, it has been firmly settled that Congress has the "power to fix the terms on which its money allotments to the [States] shall be disbursed." Lau v. Nichols, 414 U.S. 563, 569 (1974).

Congress' purpose in enacting the MBE ten percent set aside was, inter alia, to "begin to remedy" the exclusion of minority contractors from government contracts. 123 Cong.Rec. H. 1436-37 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). That purpose is undisputedly permissible.

2. The Purpose Is Substantial

As Justice Marshall stated in Bakke,

the position of racial minorities in American society today "is the tragic but inevitable consequence of centuries of unequal treatment." 438 U.S. at 395 (opinion of Marshall, J.). "It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America." 438 U.S. at 401 (opinion of Marshall, J.). "And in order to get beyond racism, we must first take account of race." 438 U.S. at 407 (opinion of Blackmun, J.).

The MBE ten percent set aside amendment, of course, was directed at the admirable purpose of remedying the exclusion of minority contractors from lucrative government contracting. See pp. 26-37, 55, 89-92, supra. But the underlying purposes are even more substantial. As summarized by Representative Mitchell:

> "We cannot continue to hand out survival support programs for the poor in this country. We cannot continue that forever. The only way we can put an end to that kind of a program is through building a viable minority business system." 123 Cong.Rec. H.1436-37 (daily ed. Feb. 24, 1977).

Representative Biaggi offered similar reasoning:

> "This Nation's record with respect to providing opportunities for minority businesses is a sorry one. Unemployment among minority groups is running as high as 35 percent. Approximately 20 percent of minority businesses have been disolved [sic] in a period of economic recession. The consequences have been felt in millions of minority homes across the Nation.
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> * * *
>
> "This amendment will go a long way toward helping to achieve [economic] parity and more importantly to promote a sense of economic equality in this Nation." *Id.* at 1440.

On the Senate side, the reasoning was virtually identical. As Senator Brooke explained to that chamber, "minority businesses' work forces are principally drawn from communities with severe and chronic unemployment.... Only with a healthy, vital minority business sector can we hope to make dramatic strides in our fight against the massive and chronic unemployment which plagues minority communities throughout this country." 123 Cong.Rec. S.3910 (daily ed. March 10, 1977).

Thus, as these legislators recog-

nized, it is clear that the purposes of the MBE ten percent set aside are not only substantial, they are of overwhelming importance.

3. The MBE Ten Percent Set Aside Is Necessary to the Accomplishment of Congress' Purposes

Year after year after year, governments have awarded fewer than one percent of all procurement contracts to minority business enterprises. This pattern was not about to change unless Congress made it change. The MBE ten percent set aside was absolutely necessary in order "to begin to remedy this situation." 123 Cong.Rec. H. 1436-37 (daily ed. Feb. 24, 1977) (remarks of Rep. Mitchell). The remedy of course was not very extensive. The ten percent figure "in fact is quite modest." Id. at 1440 (remarks of Rep. Biaggi). Nonetheless, the ten percent figure was absolutely necessary to begin to accomplish Congress' purposes.

4. There Is No Less Restrictive Alternative Available

In enacting the MBE ten percent set

aside, Congress was not making its first attempt to remedy the exclusion of minority businesses from government contracting. Rather, for a decade Congress had been pouring money into the Small Business Administration and into the SBA's Office of Minority Business Enterprise. By the mid-1970s, it became clear that the SBA's efforts were too insubstantial and too ineffectual to remedy the government's past patterns.

In reports made to Congress by the U.S. Commission on Civil Rights[6] and by the Government Accounting Office,[7] the virtually total ineffectiveness of the SBA programs and of similar programs was thoroughly documented. Similar findings were made in late 1976 by the House of Representatives Committee on Small Business.[8] It became evident to Congress

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6. U.S. Commission on Civil Rights, Minorities and Women as Government Contractors (May 1975).

7. *See* note 4 *supra*.

8. House Comm. on Small Business, Summary of Activities, H.R. No. 94-1791, 94th Cong., 2d Sess. (1977).

that a more substantial program of direct government contracts through a minority set aside was the only feasible means of accomplishing Congress' purpose.

When Representative Parren Mitchell introduced the ten percent set aside amendment, he capsulized the problems faced by minority contractors even with the assistance of the SBA/OMBE programs:

> "Let me tell the Members how ridiculous it is not to target for minority enterprises. We spend a great deal of Federal money under the SBA program creating, strengthening and supporting minority businesses and yet when it comes down to giving those minority businesses a piece of the action, the Federal Government is absolutely remiss. All it does is say that, 'We will create you on the one hand and, on the other hand, we will deny you.' That denial is made absolutely clear when one looks at the amounts of contracts let in any given fiscal year and then one looks at the percentage of minority contracts. The average percentage of minority contracts, of all Government contracts, in any given fiscal year, is 1 percent--1 percent. That is all we give them. On the other hand we approve a budget for OMBE, we approve a budget for the SBA and we approve other budgets, to run those minority enterprises, to make them become viable entities in our system but then on the other hand we say no, they are cut off from contracts." 123 Cong.Rec. 1436-37 (daily ed. Feb. 24, 1977).

Senator Brooke was equally emphatic about the absolute need, based on past experience, for the ten percent set aside. It is "necessary because minority businesses have received only 1 percent of the Federal contract dollar, despite repeated legislation, Executive Orders and regulations mandating affirmative efforts to include minority contractors in the Federal contracts pool." 123 Cong.Rec. S.3910 (daily ed. March 10, 1977).

To Congress, which enacted the ten percent set aside without dissent, there was no less restrictive alternative available to accomplish its purpose. The MBE ten percent set aside "is the only way we are going to get the minority enterprises into our system." Id. (emphasis added). It is, therefore, constitutional.

CONCLUSION

Racial minorities have traditionally been excluded from benefitting directly from government procurement programs through a complex network of events, ranging from overt racial discrimination to more subtle forms of exclusion traceable to discrimination in access to educational facilities and to adequate financial backing. The short-term result of excluding more than fifteen percent of our population from the procurement pie has been to create a substantial competitive advantage for white-owned firms seeking to profit from government procurement. Instead of a market share established by competition, white owned businesses have enjoyed a monopoly of the procurement trade attributable not to superior economic efficiency, but to the artificial exclusion of minority business enterprises as prospective competitors. Congress, in enacting the MBE set aside, sought merely to reconstruct the competitive picture as it would have existed but for the historic

exclusion of minorities from government procurement programs. In recognizing and declining to perpetuate a skewed competitive picture attributable to past racism, Congress was engaged in seeking to eliminate the current effect of past racially discriminatory procurement practices. Since petitioners have neither a moral nor a legal claim to a status quo built on racial exclusion, the decision of the Court of Appeals for the Second Circuit should be affirmed.

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